

November 1988

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Recommended Citation

Horan, Dennis J. (1988) "Hydration, Nutrition, and Euthanasia: Legal Reflections on the Role of Church Teaching," *The Linacre Quarterly*: Vol. 55: No. 4, Article 8.

Available at: <http://epublications.marquette.edu/lnq/vol55/iss4/8>

Hydration, Nutrition, and Euthanasia: Legal Reflections on the Role of Church Teaching

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The author, a long-time member of the Linacre Quarterly editorial advisory board, died very suddenly several months ago. He was a staunch, articulate pro-life supporter from his Chicago law office. He was a partner, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Ill; chairman, Americans United for Life Legal Defense Fund. Mr. Horan gratefully acknowledged the substantial research and drafting assistance provided by Edward R. Grant, Esq., executive director of Americans United for Life.

Historians of society and of medicine will recognize the 1980s as the decade in which Americans first seriously considered whether euthanasia — the direct killing of patients by omission or overt act from a merciful or beneficent motive — ought to be legalized. The developments they will cite in support of this thesis are well-known to us. Through the mass media, individuals such as Roswell Gilbert and Betty Rollin, who have committed acts of euthanasia, are praised for their courage. In academic circles, the burgeoning discipline of biomedical ethics consistently challenges the traditional moral and legal strictures against euthanasia. In law, we have seen, in the United States, court cases which permit the deliberate starvation of profoundly impaired patients who are not terminally ill. On the issue of euthanasia or mercy-killing, we clearly live in a history-making epoch.

As we examine this history-in-the-making, and attempt to influence its course, critical attention must be given to the role of the Church. Our experience in advising churchmen as well as lawmakers on these issues has taught us that the influence of the Church may be more deeply felt in this area of public policy than in many others, such as economics or war and peace, where the role of the Church is more widely publicized. This high degree of influence derives from two critical factors: the centuries-old tradition of Catholic scholarship and moral teaching on medical ethics, and the role of the Church as a provider of health care services.

The purpose of our paper is to examine the interplay between Church teaching and public policy on euthanasia by focusing on the current debate in the United States over the provision of nourishment to certain patient populations. We will begin with a brief overview of the legal status of this question, and then proceed to review the actions of the Church, acting through local ordinaries and episcopal conferences, as well as through individual theologians, on the formation of public policy. Finally, we will examine current writings of theologians who profess full support for the Church's traditional teaching against euthanasia, but who nevertheless accept the withdrawal of nutrition and hydration from non-terminally ill patients as within that teaching. We will argue that public policy will not be able to preserve the distinction that is drawn by these theologians between deliberate starvation of non-terminal patients, and more direct means of killing patients, and that the Church's moral teaching should take into account the need for clarity in the realm of public policy.

I. Legal Issues Concerning Nutrition and Hydration

A. The Emergence of the Nutrition and Hydration Issue

Early cases involving the termination of medical treatment, such as those of Karen Quinlan¹ and Joseph Saikewicz², did not reach the question of whether nourishment can be withdrawn from a patient, thus allowing the patient to die. The legal consensus emerging from these cases seemed to be in agreement with the teaching of Catholic moral theology that extraordinary and invasive means of therapy are not obligatory, particularly in the case of terminal illness. However, it was presumed that ordinary means of support, such as nourishment and warmth, would always be provided.³

This view was first challenged in American law in 1982. In that year, murder charges were brought against two California physicians, Dr. Barber, and Dr. Nejd, for their role in the death of a 55 year-old racetrack guard, Clarence Herbert.⁴ Mr. Herbert had suffered cardiac arrest in the recovery room following surgery performed by Dr. Nejd, and due to oxygen deprivation lasting several minutes, remained in a coma. Three days after this incident, the two doctors authorized the removal, with the family's permission, of Mr. Herbert's mechanical ventilator. When the patient was able to breathe on his own, the doctors then approached the family and suggested that all life-support, including intravenous feeding, be halted. This was done, and the patient died a week later.

In a 1983 decision, a California appellate court dismissed the homicide charges.⁵ The court held that the use of intravenous feeding "is the same as the use of the respirator or other forms of life support equipment", and that there is no legal duty upon physicians to provide any such life support to a person in Mr. Herbert's condition. These holdings were remarkable, not only because they abruptly expanded the freedom of doctors to

remove life-sustaining treatment and nourishment from grievously-impaired patients, but also because of the haste with which treatment was withdrawn in this particular case.⁶

That same year — 1983 — also saw the issuance of the report of the President's Commission for the Study of Ethical Problems in Medicine on the termination of life-sustaining medical treatment.⁷ This report recommended that the essential conclusions of the California appellate court be adopted in other legal jurisdictions: namely, that no distinction be drawn between tube feeding and other forms of life-sustaining treatment such as dialysis or ventilation. In the intervening years, culminating in five decisive opinions delivered in 1985 and 1986. American law has moved swiftly to accommodate this controversial recommendation of the President's Commission.

1. *In re Claire Conroy*

The New Jersey Supreme Court was also the first state supreme court to directly face the issue of whether nourishment may be withdrawn from a patient on the same basis as other forms of medical treatment. In the case of *Claire Conroy*⁸, the court held that medical treatment, including nourishment by "artificial" means, may be withheld from nursing home patients with a life expectancy of less than one year, provided that certain safeguards are met. First, it must be determined, if possible, whether the patient had left "clear and convincing" evidence regarding his or her preferences for medical treatment in such a situation. Second, the withdrawal of life-sustaining treatment was to be approved by two independent physicians, a committee of the nursing home, and a state ombudsman for the elderly. Strong evidence suggests, however, that these safeguards are being disregarded, and thus, that the most effective aspect of the opinion is its holding that nourishment may be withdrawn on a par with other forms of medical treatment.⁹

2. *Corbett, Jobs and Bouvia*

Subsequent cases support the thesis that the *Conroy* safeguards will be disposed, thus permitting the withdrawal of nutrition and hydration from a wider circle of patients, including those who are not terminally ill. In the case of *Nancy Jobs*, currently before the New Jersey Supreme Court, a trial court held that a feeding tube may be removed from a profoundly impaired nursing home patient, even though the court acknowledged that "if the feeding tube is removed, dehydration and starvation will follow, and Ms. Jobs will die."¹⁰ In the same month, April, 1986, appellate courts in two other states, Florida and California, held that no state interest is sufficient to override an impaired patient's decision to forego feeding.

In the Florida case, *Corbett v. D'Alessandro*, an appellate court held that the right to have a nasogastric tube removed is a constitutionally-protected right.¹¹ Thus, despite the fact that the Florida living will statute

did not include nutrition and hydration as treatment that the patient may direct to be withheld, a patient's proxy may nevertheless order these elements to be withheld. This is so because the living will statute may not override the now-incompetent patient's constitutional rights, and the exercise of those rights by the patient's proxy.¹²

The California decision, in the case of Elizabeth Bouvia¹³, has gone the furthest of any American court in endorsing a right to euthanasia. The court decided that Ms. Bouvia could refuse assisted feeding on the grounds of the "indignity" of her life as a quadriplegic, needing the care of others for her basic needs. The court's attitude toward the value of human life is revealed in its description of Ms. Bouvia's existence. "She herself is imprisoned and must lie physically helpless subject to the ignominy, embarrassment, humiliation and dehumanizing aspects created by her helplessness. We do not believe it is the policy of this State that all and every life must be preserved against the will of the sufferer. It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or, more accurately, endure, for 15 to 20 years."¹⁴

One justice of this court went even further, holding that Ms. Bouvia has an absolute right to end her life, not merely through starvation, but by enlisting the direct intervention of the medical profession to kill her. "The state and the medical profession instead of frustrating her desire, should be attempting to relieve her suffering by permitting and in fact assisting her to die with ease and dignity The right to die . . . should, in my opinion, include the ability to enlist assistance from others, including the medical profession, in making death as painless and quick as possible."¹⁵

3. Brophy v. New England Sinai Hospital

Finally, in September, 1986, the Supreme Judicial Court of Massachusetts ruled in the case of Paul Brophy¹⁶ that a feeding tube may be withdrawn from a person in a persistent vegetative state when that person expressed a prior desire not to be kept alive in such a state. Although *Brophy* was not the first opinion to decide this question, it marked the first time that a judicial decision actually permitted the starvation death of a patient who had been alive at the time the decision was reached. The decision has more than the usual significance since the court agreed that Mr. Brophy was not in a terminal state, nor was death imminent from any medical cause, but that he would die as a result of the failure to feed. This acknowledgment was interpreted by some observers, including the three dissenting justices, as tantamount to the legalization of assisted mercy-killing. These dissenting justices, all practicing Catholics, also suggested that once starvation of patients is accepted practice, the pressure will be overwhelming to approve the efficient and painless disposition of patients through injection and other direct means.¹⁷

The decisions in *Brophy* and *Bouvia*, therefore, establish that the

debate over the withdrawal of nutrition and hydration is, in reality, a debate over the legitimacy of mercy-killing. Robert Destro, a professor of law at Catholic University of America and a member of the United States Civil Rights Commission, writes that the “‘food and water’ issue must be seen for what it is: the entering wedge of an ethic which would permit intentional steps to end the lives of the disabled Once intentional steps to cause death — rather than passive measures which permit the condition or disease to take its natural course — have been approved, the inescapable conclusion is that it is the *existence* of the disabled person which constitutes the undesirable condition. The ‘remedy’ for certain disabilities under the functional ethic is death. Food and water — the basic requirements of life itself — are redefined as medical ‘treatments’ which can be withdrawn when the patient can no longer be made whole.”¹⁸ This is clearly indicated by the court’s holding in *Brophy* that the maintenance of Mr. Brophy “for a period of several years, is intrusive treatment *as a matter of law*.”¹⁹

II. Church Reaction to and Participation In The Formation of Current Policy

The Church has played an influential role in the development of public policy which we have just briefly outlined. Involving the work of theologians, local ordinaries and state and national episcopal conferences, the contribution of the Church has been diverse and complex. As in the case of many other issues over recent decades, the presence of so many voices has raised the question of who authentically speaks for the Church on matters of medical morality. However, the lack of unity in the Church’s teaching cannot be attributed solely to the number and variety of participants; it is a function likewise of evolutions in philosophy and strategy on the part of some of the most key participants.

A. Court Testimony by Theologians

Several Catholic priests have testified in the court cases on the issue of providing nutrition and hydration, claiming to offer the perspective of Church teaching. Rev. John Paris, S.J., of Holy Cross College in Massachusetts, has been the most active priest-witness. He testified for two days on behalf of Drs. Barber and Nejdil at the preliminary hearing held in connection with the homicide charges brought against them. Father Paris also testified in favor of the withdrawal of feeding tubes from those patients in a persistent vegetative state in the *Brophy* and *Jobes* trials. In *Conroy*, Rev. Joseph Kukura, a professor in medical ethics at a diocesan seminary, testified in favor of removing the nasogastric feeding tube. Rev. John Connery, S.J., offered an opposing perspective in the *Brophy* case, and his testimony was cited approvingly by the trial court judge who refused the family’s request to permit the cessation of feeding.

B. U.S.C.C. Statements

The United States Catholic Conference, and the committee on Pro-Life Activities of the National Conference of Catholic Bishops, has tended to side with the position expressed by Father Connery. These groups have not participated in litigation, but have commented frequently upon various legislative proposals concerning the provision of medical treatment to the terminally ill. The Conference has taken the position that legislation protecting a limited right to refuse medical treatment, and to write an advance directive to be used in the event of incompetency, is permissible. However, the Conference has stated that such legislation must exclude nutrition and hydration from the categories of medical treatment which may be withdrawn under a so-called "living will".²⁰

C. Experience of New Jersey Catholic Conference

As in the case of abortion, however, it is the courts, not the legislatures, which appear to have the strongest role in staking out the fundamental direction for the law on this issue. Courts are forced to deal with the particulars of difficult, complex cases, and they are better prepared than legislatures to deal with the ethical and legal nuances of the problem. This is not to advertise a "judicial supremacist" approach to the issue, but simply to recognize an important reality in the formation of public policy.

This has particularly been so, for reasons of historical accident, in the state of New Jersey, home of the *Quinlan*, *Conroy* and *Jobes* cases referred to earlier. In examining the role of the Church in affecting public policy, and the way this teaching role may be influenced by events outside of the Church, we can study the role of the New Jersey Catholic Conference in each of these three cases.

In *Quinlan*, the Conference brief consisted of a statement of instruction to the faithful of the Paterson diocese which, employing the Church's traditional distinction between ordinary and extraordinary means, supported the position of the Quinlan family.²¹ While reiterating the Church's prohibition of euthanasia or mercy-killing, the Conference brief submitted that the withdrawal of Karen Quinlan's respirator did not violate this prohibition. It is apparent in reading the Supreme Court's opinion, written by Chief Justice Richard J. Hughes, (also a Catholic), that the Court took no small comfort from the Church's statements in this regard.

In *Conroy*, the Conference brief did not take a position on whether withdrawal of the feeding tube would be ethically appropriate in that particular case.²² The brief consisted of several Church statements concerning euthanasia and the prolongation of life, and introductory material urging the applicability of these principles to society at large. However, the brief could not have been particularly helpful to the Court in determining how these principles ought to be applied. Moreover, the brief avoided the essential question presented by the opinion of the lower

appellate court that was under review. That lower court had rejected removal of the feeding tube on grounds that it would constitute euthanasia and thus offend public policy.²³ While the Conference condemned euthanasia and medical treatment decisions based on the "quality of life", it offered no support for the position of the appellate court. Rather, the Conference brief expressed concern that the court's firm stance on public policy would unduly restrict medical practice, the firm stance on public policy grounds taken by the appellate court. "We cannot impress upon the Court more strongly the caution that in an attempt to resolve a question which may be simply stated, we do not overly restrict the judgment of medical decision-makers by trying to judicially decide what this Court may perceive to be public policy."²⁴

In the *Jobes* case, however, the Bishops' Conference submitted a brief very different from those in *Quinlan* and *Conroy*. For the first time, the Conference explicitly recognized the distinction between personal ethical judgments and the formation of public policy, and endorsed the view that the interests of public policy should, where appropriate, take precedence. "[W]e ask the Court not to look favorably on a plea for sanctioning starvation as a means of death for a patient who would not otherwise die immediately. In this we make no ethical judgment of the plaintiff. Indeed we can understand their [sic] motivation. Our emphasis, rather, is that the corporate conscience of the nursing home reflects traditional public policy which has brought us our laws against aiding suicide and euthanasia, and has resulted in the type of patient care which balances duty and benefits to society against a spurious 'right to die' and relief from burdens sustained regularly by a multitude of suffering but non-terminal patients across the nation. The Conference maintains that nutrition and hydration, being basic to human life, are aspects of normal care, which are not excessively burdensome, that should always be provided to a patient."²⁵

D. Lessons from the New Jersey Cases

We do not mean to single out the work of the New Jersey Bishops' Conference, but to consider it as an example of the difficult process in which the Church is now engaged: to be faithful to her moral tradition, while helping to prevent a public policy which favors mercy-killing. If, as the Conference brief in *Conroy* submits, the teaching of the Church is applicable to all of society, then the Church must in turn consider in the formulation of its own statements the decisive nature of the trends in public policy which are now emerging. This imperative applies to bishops, theologians, and all who aim to speak in the name of the Church's moral tradition. In formulating Church teaching, it is no longer adequate to focus entirely upon the obligations of an individual patient to accept or reject certain forms of medical treatment. The question facing the arbiters of public policy is somewhat different: the responsibility of society to care for those no longer able to care for themselves. As we see in many facets

of life, the trend is very strong to diminish those responsibilities. The success of this trend within the medical and nursing professions, which have traditionally been devoted to zealous protection of the welfare of the individual patient, could be disastrous.

It is apparent from reviewing the last 35 years of Catholic literature on the subject, that we cannot expect a clear consensus from our moralists on the question of whether mechanical means of feeding a patient over an indefinite period of time constitute an extraordinary means of treatment.²⁶ However, we must recognize, as the New Jersey Catholic Conference has in its *Jobes* brief, that far more is at stake than the content of Catholic moral teaching. In the interest of maintaining a public policy which prohibits the deliberate starvation of patients with the intent and effect of bringing about their deaths, or the legalization of assisted suicide, we will have to subordinate our interest in making these judgments solely under the guidance of Catholic moral teaching. We may feel confident that our own institutions will only permit the withdrawal of feeding in morally appropriate cases, and will never slide into the widespread practice of starvation, and then, active means of euthanasia. But it would be utterly naive for us to believe that public policy will follow a similar course.

This is demonstrated by another case from New Jersey, *Matter of Requena*, in which a Catholic hospital was required by both a trial and appellate court, against its formally-stated objection, to remove a feeding tube from a patient with amyotrophic lateral sclerosis, who had requested it to be removed, and permit her to starve to death. The trial court criticized the ethical objections of the hospital as being improperly judgmental of the patient's intentions, and too zealously "pro-life".²⁷ The court also criticized the failure of the hospital to consult the views of the treating physicians, who accepted Mrs. Requena's decision. Admittedly, the case of a conscious patient, afflicted with terminal illness and near death, who requests not to be fed, is the most difficult situation in which to insist that feeding be continued. Indeed, if death is imminent, such a decision may be appropriate. But *Requena* remains a compelling reminder that the currents of public policy are moving, swiftly and powerfully, to alter the practice of medicine even within Catholic health care institutions.

III. Observations on Current Trends in Catholic Thought

A. The Current Threat in Public Policy

The public policy against euthanasia is embodied in the laws of homicide, which have, for centuries, refused to create an exemption for killings carried out with a "compassionate" motive. Other areas of the law, notably those dealing with the provision of medical treatment, have respected this policy. The rationale for the policy is the equality and intrinsic value of human life, as well as the need for trust and confidence that all citizens are bound to respect the lives of others. The creation of even narrow exceptions to this policy would be fatal to the entire policy,

for it would create arbitrary criteria of physiological and intellectual fitness which must be met in order to qualify for the protection of the law. The promise that we will not kill each other, a fundamental axiom of our society, will be lost, for each of us may one day fall into one of the categories of life — be it terminal illness, persistent coma, or other disability — which is exempt from the law's absolute protection against killing.²⁸

The public policy against mercy-killing does not, and has never, required that all efforts be used in every case to sustain life, particularly when such efforts are useless, as in the case of imminent death. It is when decisions are made to withdraw the non-burdensome sustenance of life, food and water, with the intent of causing death, that this policy is offended. As the courts recognized in the *Jobes* and *Brophy* cases, the patients are not terminally ill and could live with tube feeding for many years. The effort to remove their feeding tubes is simply meant to bring about their deaths. As the New Jersey Catholic Conference stated in its *Jobes* brief, one may have sympathy for the family in this situation, but one must also keep a clear head about the radical consequences for public policy of permitting a family to order that one of its members be starved to death.

B. Current Catholic Teaching and Public Policy

Less than a year ago (Mar. 1986), in a paper delivered at St. Francis Hospital in Miami Beach, I noted a disquieting trend among some Catholic theologians on the subject of withdrawing nutrition and hydration.²⁹ I suggested that these moralists ought to weigh their comments more carefully in light of the volatile developments in public policy which were then occurring. Since that time, events have moved swiftly in the direction of permitting withdrawal of nourishment. The decisions in *Jobes*, *Bouvia*, and *Brophy*, as well as others we have not mentioned here, have all been issued in the past year. In addition, the Judicial Council of the American Medical Association has endorsed the removal of food and fluids from patients who are permanently comatose or in a persistent vegetative state.³⁰ During this time, we have seen a continuation of the trend among Catholic moralists to approve the withdrawal of nourishment in these cases, while attempting to maintain their opposition to direct means of killing patients.

However valid this distinction between the starvation and the direct killing of patients may be on grounds of moral theology, it is not valid and will not be respected within the realm of public policy. The writings of Catholic moralists have largely ignored the potential consequences for public policy of cases such as *Jobes* and *Brophy*. They assume that public policy will be able to maintain the fine distinction between the withdrawal of feeding and the injection of a lethal agent. We believe this assumption has been proven wrong already in the opinion of the *Bouvia* case, where the

court endorsed deliberate starvation as a means of euthanasia, and suggested that the law should also permit more painless and efficient means of euthanasia. Furthermore, if the public sees that it is permissible to starve patients in the condition of Karen Quinlan, Paul Brophy, and Nancy Jobes, it will demand the same liberty for other patients whom families and society find difficult to care for. Parties will be able to argue under the principle of equality that the "right" not to be fed cannot be limited to a narrow category of patients. Finally, to most common sense observers, the only logical alternative to the grotesque manner of dying which results from starvation would be to perform active euthanasia and kill the patient instantly. Many will argue that it is more humane to kill painlessly than to cause the additional prolonged agony of death by starvation.

Many Catholic moralists have not only ignored the public policy consequences of these decisions, but have also offered rationales for the withdrawal of nourishment which will further undermine the public policy against euthanasia. In Catholic teaching, the analysis of extraordinary versus ordinary means has often focused on the burdensomeness and invasiveness of treatment. Judged by these criteria, nutrition and hydration, even by tube, would fall into the category of ordinary treatment. As found by the trial court in the *Brophy case*, the feeding of a patient through a nasogastric tube or gastrostomy tube, is neither invasive, burdensome, or painful. In justifying the removal of feeding, therefore, moralists have shifted their focus to subjective factors such as "quality of life" and the "psychological repugnancy" of feeding. Although the objective, physical burdens upon a patient remain a part of the moralists' analysis, it is clear that the question turns upon the degree to which the physiological and neurological condition of the patient may justify a cessation of all efforts to sustain life — even feeding and hydration.

An Intriguing Formulation

One of the more intriguing formulations of this standard is that of Rev. Kevin O'Rourke, O.P., which states that in the absence of cognitive-affective function, there is no duty to preserve life because the ability to pursue the purposes of life — love of God and neighbor, happiness, relationships — does not exist.³¹ Father O'Rourke should not be singled out, because his position is echoed by a number of other leading moralists. In a review of current teaching published in *Health Progress*, Rev. James J. McCartney, O.S.A., concludes: "Catholic teaching is not opposed to the withholding or withdrawal of artificial sustenance when, in the patient's view, this intervention becomes physically, emotionally, or spiritually too difficult to bear, either for the patient or others."³² Father McCartney suggests that the problem of incompetent patients should be resolved by oral or written "living wills" delivered to a trusted family member or friend. Rev. Richard McCormick, S.J., has written that the care of the comatose

may be resolved by terming such patients to be in a "terminal state" — even though their life expectancy is indefinite.³³

Leslie Rothenberg, a non-Catholic attorney and medical ethicist at the University of Southern California, has written that these statements of Catholic theologians will have an undoubted impact on the formation of public policy, and whether intended to or not, will assist the cause of legalizing euthanasia.³⁴ Rothenberg's insight is not hard to grasp, for much of the language employed by the moralists seems virtually indistinguishable from that authored by the proponents of euthanasia. "Much of this debate," he writes, "centers on whether one views the death of such patients as a benefit . . . or their continued survival as a burden. Discussions of such concepts, as well as those of a 'benefit-burden calculus' or the test of 'cognitive-affective function' could actually place the statements of Catholic theologians and those of euthanasia proponents in close proximity. Fr. [Thomas] O'Donnell has acknowledged this concern, noting that the characterization of artificial nutrition and hydration as extraordinary means of preserving life in some cases is 'likely to be seized by proponents of euthanasia, and ever-so-slight distortions may be presented as Catholic authority for their euthanasia propaganda.'"³⁵

It may not be sufficient, however, for Catholic moralists to simply acknowledge the danger that their teaching will be misapplied to justify practices which neither they nor the Church would endorse. These theologians are consciously aware of the developments in public policy on the nutrition and hydration issue; indeed, their current writings are in direct response to events such as the *Brophy* decision and the AMA policy on withdrawing nutrition. While the theologians may be firm in their stance against direct lethal intervention, the society and medical profession which they seek to instruct is not. Public opinion polls suggest that over 60 percent of Americans favor active mercy-killing in an unspecified range of cases. A society so disposed will not accept the fine distinction that theologians and other commentators now draw between the removal of nourishment, and more direct means of bringing about the death of patients.

Although Catholic moralists have strongly denied this, what is occurring, in fact, in cases such as *Jobes* and *Brophy*, is the purposeful death-by-design of severely impaired patients through the means of starvation. These deaths involve patients who are not in pain, are not terminally ill, and, due to insurance coverage, are not a financial burden upon their families. The more compelling cases for euthanasia will arise when the factors of pain, terminal illness and financial burden are present. Witness the recent story in *Life* magazine describing an aging couple's systematic hoarding of prescribed drugs in order to commit suicide.³⁶ The argument will follow that since it is permissible for certain non-terminally ill patients to starve to death, then it should be permissible for other, more desperate, patients to die quickly and painlessly through lethal injection. A referendum proposing this alternative is now being sponsored by the

IV. Reconciling Catholic Teaching and the Needs of Public Policy

Catholic teaching, therefore, must take account of two factors which do not receive adequate discussion in the current writings of theologians. First, it must recognize the difference between the moral responsibility of an individual patient to accept life-sustaining treatment, and the duty of society to enact just laws to prevent the neglect and killing of patients. The nuances and ambiguities which are often acceptable in positions of moral theology, may cause confusion in the arena of public policy. Furthermore, they may lead to results in policy which are absolutely inimical to the central tenets of Church teaching. Second, Church teaching must more explicitly recognize a phenomenon of modern society which is often termed the "slippery slope". As Prof. Arthur Dyck of Harvard University has written, once euthanasia is permitted in a small number of cases, it will gradually be applied to a many others, because there is no way to limit the principle which allows mercy killing to a narrow range of cases definitely circumscribed and carefully controlled.³⁸ Is the case for euthanasia stronger in the case of the comatose patient who may not sense his condition, or in the case of an Elizabeth Bouvia or Ida Rollin who suffer constant pain? The principle of equality under law would seem to demand that all patients who claim unbearable suffering be permitted, whether by their own volition or through a surrogate, to end their lives. Thus, as in the case of abortion, to open the door and legalize mercy killing in one case in modern, democratic societies is to legalize it in a full range of cases which are never contemplated by the progenitors of the policy.³⁹

For these reasons, what appear to be even small inroads against the law's prohibition of euthanasia should be firmly resisted. The Church will aid this resistance if it continues to recognize that it is permissible for the law to draw a stricter standard governing the provision of medical treatment than might appear mandatory in the realm of moral theology. There should be nothing startling about this proposal. At stake in the realm of moral theology is not only the preservation of Catholic doctrine, but the counseling and nurturing of individual souls. In order for this benefit to be available to all believers in all strata of society, teachers of moral theology must take into account a wide variety of circumstances, and must avoid the error of unduly burdening the consciences of the faithful.

The makers of public policy must take into account a similarly-wide range of circumstances. But the stakes are much different. Law must guide and regulate human conduct, and to do this effectively it must, on occasion, draw sharp lines. Even if theologians prefer not to focus their lines with the same degree of clarity, they must be aware of the consequences if the law fails to do so. This is particularly true if theologians are to continue in their role of advising the courts and

legislatures on acceptable public policy in this area.

Where should the public policy line be drawn on nutrition and hydration? Because the removal of these elements will inevitably bring about death in every case, the law should not permit their removal unless a patient is imminently dying, or the means of providing nourishment are ineffective or actually harmful to the patient. The 1986 statement of the AMA Judicial Council would add another category: the permanently comatose or "vegetative" patients.⁴⁰ The reasons this addition by the AMA should be vigorously resisted are set forth by the trial judge in the *Brophy* case, who refused to order the removal of the feeding tube. "A society which rejects euthanasia, the selective killing of the unfit, the insane, the retarded and the comatose patient is morally obliged to sustain the life of an ill human being, even one in a persistent vegetative state, provided that in the process of sustaining his life, he is not subjected to treatment which is highly invasive or burdensome, and which causes him extreme discomfort or pain."⁴¹ As Judge Kopelman recognized, thousands and perhaps millions of persons in society have lost the capacity for "cognitive-affective function" relied upon by some commentators as a valid criterion for relinquishing all efforts to sustain life. His duty, and the duty of all judges and legislators, is to protect the life and the rights of these powerless citizens. All who share this interest would do well to follow the vision of Judge Kopelman, who saw in the tragic circumstances of Paul Brophy's condition a challenge to the most fundamental values of our legal system. When the Church teaches in the area of medical morality and ethics, it must give credence to these fundamental values, and also recognize that, in modern society, they are very fragile indeed.

References

For more detailed analysis of the cases, statutes, and legal doctrines discussed in this chapter, refer especially to the sources cited in notes 3, 4, 12, and 18.

1. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert denied sub nom. Garger v. N.J.*, 429 U.S. 922 (1976). The New Jersey Supreme Court appointed the adoptive father of Miss Quinlan as her guardian, with authority to give his consent to a decision to remove his daughter from a mechanical ventilator. The ventilator was withdrawn, and Miss Quinlan subsequently lived for nine years.

2. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E. 2d 417 (1977). The Massachusetts Supreme Judicial Court held that, under the same constitutional privacy right to refuse medical treatment that was established in *Quinlan*, chemotherapy could be withheld from a severely retarded, lifelong resident of a state hospital.

3. Dennis Horan and Edward Grant, "Prolonging Life and Withdrawing Treatment: Legal Issues," 50 *Linacre Quarterly*, 153, 166-68 (1983); reprinted in *AUL Studies in Law and Medicine*, No. 15, available from AUL Legal Defense Fund, 343 S. Dearborn St., #1804, Chicago, Ill. 60604.

4. For a fuller discussion of this case, see Dennis Horan and Edward Grant, "The Legal Aspects of Withdrawing Nourishment," 5 *J. of Legal Med.* 595 (1983) (reprinted in *AUL Studies*, No. 19, note 3, *supra*).

5. *Barber v. Superior Court*, 147 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984).

6. See Horan and Grant, *supra*, note 4 at 607-612.
7. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* (1983).
8. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).
9. Sullivan, "Jersey Curbs on Ending Life Supports are Ignored," *New York Times*, Nov. 27, 1986.
10. *In re Jobes*, No. C-4971-85E (N.J. Super. Ct., Chancery Division, Morris County, Apr. 23, 1986), slip op. at 1.
11. 487 So. 2d 368 (Fla. App. 2d Dist. 1986), *petition for review denied*, No. 68,817 (Fla. Sup. Ct., July 30, 1986).
12. See C. Everett Koop and Edward Grant, "The Small Beginnings of Euthanasia: Examining the Erosion in Legal Prohibitions Against Mercy-Killing," 2 *Notre Dame Journal of Law, Ethics, and Public Policy*, 585, 632, n. 152 (1986)
13. 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).
14. 225 Cal. Rptr. at 305.
15. 225 Cal. Rptr. at 307 (Compton, J., concurring).
16. *Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626 (1986).
17. "The withdrawal of the provision of food and water is a particularly difficult, painful and gruesome death; the cause of death would not be some underlying physical disability like kidney failure or the withdrawal of some highly invasive medical treatment, but the unnatural cessation of feeding and hydration which, like breathing, is part of the responsibilities we assume toward our bodies routinely. Such a process would not be very far from euthanasia, and the natural question is: Why not use more humane methods of euthanasia if that is what we endorse? The State has an interest in maintaining the public integrity of the symbols of life — apparent euthanasia, and an apparently painful and difficult method of euthanasia, is contrary to that interest." 497 N.E.2d at 641 (Lynch, J., dissenting).
18. Robert Destro, "Quality of Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights of and Equal Protection for the Disabled and Incompetent," 2 *Journal of Contemporary Health Law & Policy* 71, 92 (1986).
19. 497 N.E. 2d at 636.
20. Bishops' Committee for Pro-Life Activities, "Guidelines for Legislation on Life-Sustaining Treatment" (1984); "Statement on the Uniform Rights of the Terminally Ill Act", (1986). Copies of the testimony of Father Paris in *Barber and Brophy*, of Father Kukura in *Conroy*, and of Father Connery in *Brophy*, are on file with Americans United for Life, note 3, *supra*.
21. Brief of New Jersey Catholic Conference as *Amicus Curiae*, reprinted in *In the Matter of Karen Quinlan*, Vol. II, p. 197 (1976).
22. Brief and appendix for *Amicus Curiae* New Jersey Catholic Conference, *In re Claire C. Conroy*. (Copy on file with authors).
23. *In re Conroy*, 190 N.J. Super. 453, 464 A.2d 303 (1983).
24. Brief and appendix, *supra* note 22 at 3.
25. Brief and appendix of the *Amicus Curiae* New Jersey Catholic Conference, *In re Nancy Ellen Jobes*, Docket No. 26,041 (N.J. Supreme Ct., 1986) at 4-5. Reprinted in *Origins* (National Catholic News Service), Jan. 22, 1987. Interestingly, a sentence appears in the *Jobes* brief which is very similar to the enigmatic portion of the *Conroy* brief quoted in the text of this article. See *Jobes* brief at 3. This portion of the *Jobes* brief appears to have been lifted, with minor revisions, from the Conference brief in *Conroy*. However, the context in which the passage is placed is quite different. The preceding paragraph of the *Jobes* brief states that "withdrawal of nutrition and hydration introduces a new attack upon human life." The *Conroy* brief makes no such statement.
26. Compare, James McCartney, "Catholic Positions on Withholding Sustenance for the Terminally Ill," *Health Progress*, Oct. 1986, at 38, with Leslie Rothenberg, "The Dissenting Opinions: Biting the Hands That Won't Feed," *Health Progress*, Dec. 1986, at 38.

27. *In re Requena*, 213 N.J. Super. 475 (Ch. Div., 1986), *aff'd*, 213 N.J. Super. 443 (App. Div. 1986). The trial judge, Reginald Stanton, in suggesting that the hospital reconsider its ethical objection to the desire of Mrs. Requena not to receive nourishment, attempted to distinguish feeding-tube cases from the question of abortion, and gave a rare glimpse of a judge's rejection of current policy on abortion. "I suspect that part of the Hospital's insistence on what it perceives as a pro-life position in this case is a mistaken fall-out from the abortion controversy which is ongoing in our society. The Hospital, whose values are premised as they are on the loving care of people, naturally (and I think properly) views abortion as a terrible evil. But abortion involves the active, direct, intentional termination of life by interfering in the processes of nature. The life taken is usually perfectly healthy. The fetus does not in any sense consent to what is done to it. None of those elements are present in Mrs. Requena's case. There is no sensible comparison to be drawn between the two situations." 213 N.J. Super. at 486.

28. See Destro, *supra* note 18 at 115-122; Gilbert Meilaender, "The Confused, the Voiceless, the Perverse: Shall We Give Them Food and Drink?" 2 *Issues in Law and Medicine*, 133, 134-136.

29. Dennis Horan and Edward Grant, "Catholic Ethical Teaching and Public Policy: How Do They Relate?", *Linacre Quarterly*, Nov., 1986, p. 28.

30. Council on Ethical and Judicial Affairs, American Medical Association, Statement on Withholding or Withdrawing Life Prolonging Medical Treatment, March 15, 1986. Reported in *American Medical News*, March 28, 1986, p. 1.

31. Kevin O'Rourke, "The A.M.A. Statement on Tube Feeding: An Ethical Analysis," *America*, Nov. 22, 1986, p. 321, 322.

32. McCartney, *supra* note 26.

33. Richard McCormick, "Caring or Starving? The Case of Claire Conroy," *America*, April 6, 1986, p. 269, 272.

34. Rothenberg, *supra* note 26 at 42-44.

35. *Id.* at 44, quoting O'Donnell, *The Medical-Moral Newsletter*, Nov. 1986, at p. 36.

36. "The Liberation of Lolly and Gronky", *Life*, Dec. 1986.

37. *Hemlock Quarterly*, April 1986, p. 1.

38. Arthur Dyck, "Beneficent Euthanasia and Benemortasia: Alternative Views of Mercy", in *Death, Dying, and Euthanasia*, pp. 348-361 (1980).

39. Dennis Horan, "Euthanasia and Brain Death: Ethical and Legal Considerations, 315 *Annals of the New York Academy of Science*, 363, 372 (1978).

40. AMA Statement, note 30, *supra*. See also, Koop and Grant, *supra* note 12 at 594, n. 24.

41. *Brophy v. New England Sinai Hosp.*, No. 85E0009-G1 (Mass. Probate Ct., Norfolk, Oct. 21, 1985) slip op. at 42-43.